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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. —

FEDERAL POWER COMMISSION, PETITIONER

v.

SOUTHERN CALIFORNIA EDISON COMPANY AND PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on November 15, 1962.

OPINIONS BELOW

The opinions of the Court of Appeals for the Ninth Circuit (App. A, *infra*, pp. 17–41) are not yet reported. The orders of the Federal Power Commission (R. 839–869, 892–897) are reported at 26 F.P.C. 223 and 492.

JURISDICTION

The decree of the Court of Appeals setting aside the Commission order was entered on November 15, 1962 (App. B, *infra*, pp. 42–43). The jurisdiction of

this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

QUESTION PRESENTED

Whether the Commission's exercise of its authority under Section 201(b) of the Federal Power Act to regulate "sale[s] of electric energy at wholesale in interstate commerce" is dependent upon its making, as to each wholesale transaction, an individual determination that there is a "national interest" in the sale arising from a conflict of state interests.

STATUTE INVOLVED

The pertinent provisions of the Federal Power Act, 41 Stat. 1063, as amended, 16 U.S.C. 791–825r, are set out in Appendix C, *infra*, pp. 44–48. A corresponding provision of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717–717w, which is involved in closely related cases, is also set forth (*infra*, p. 48).

STATEMENT

The decision below set aside a Federal Power Commission determination that it had jurisdiction, pursuant to the provisions of Section 201(b) of the Federal Power Act, over Southern California Edison Company's sales at wholesale to the City of Colton, California.

The administrative proceeding involved in this case was initiated before the Federal Power Commission by the City of Colton, California, which challenged the lawfulness of rate increases which had been put into effect by Southern California Edison Company

for electric energy sold to the City to supply its municipal electric utility system. Edison had obtained approval of those increases from the California Public Utilities Commission. The City claimed, however, that in substantial part the energy came from out-of-state sources, and that the rates for such power were thus subject to the authority of the Federal Power Commission rather than the California Commission. Hence, it was asserted, Edison's failure to file its rate increases with the Federal Power Commission made its collection of the increases unlawful and subject to refund.

The facts, as developed at a hearing before the Federal Power Commission, showed that Colton, a city of some 18,000 persons located near San Bernardino, California, purchased the entire electric energy requirements of its municipally owned electric utility system from Edison under a contract dated October 1, 1945 (App. A, *infra*, p. 18). During the calendar years 1954 through 1958, Colton served, on an average basis, from 5,400 to 6,025 retail customers (R. 843).

Edison, admittedly a "public utility" within the meaning of Section 201(e) of the Power Act, markets electric energy in central and southern California. It owns and operates a number of steam and hydroelectric generating stations in California and also obtains energy from the Hoover, Davis and Parker water power projects on the Colorado River, the energy at Hoover and Davis being generated in either Nevada or Arizona. (R. 840–841.)

The Hoover, Davis, and Parker projects, which are owned by the United States, are interconnected by a 220 kilovolt (kv) transmission line. Both Edison and the Metropolitan Water District of Southern California (Water District) are connected with this 220 kv system. Water District lines from Hoover and Parker interconnect at its Camino switching station in California and extend to a connection with Edison's 220 kv line at Hayfield, in California. From Hayfield, Edison's 220 kv line extends about 105 miles in a westerly direction to its Highgrove substation. From there, delivery of power is made to the City of Colton. In addition, Edison itself owns and operates two 220 kv lines from the Hoover project, in Nevada, to Edison's Chino substation in California, which is connected with the Highgrove substation, fifteen miles away (R. 841).

The Commission found there are thus three routes by which out-of-state energy may reach the City of Colton. The first path is from Hoover over the Water District line to the Camino switching station, to the interconnection with Edison at Hayfield, to the Highgrove substation, and thence to Colton through two substations. The second route is from Hoover to Davis, to Parker, to the Camino switching station, to Hayfield, to Highgrove and thence as before to Colton. The third route is over Edison's own 220 kv lines from Hoover to Chino, to Highgrove and thence to Colton as before. The electrical engineering witness of the Commission's staff presented evidence relating to use of the first two of these routes during

the period from July 1, 1954 to November 30, 1958 (R. 841–842).

The Commission further found that out-of-state energy from both Hoover and Davis Dams was included in Edison's sales at wholesale to the City of Colton during that period, and that at least since July 1, 1954, the sale was one in interstate commerce (R. 851–854). This energy, which is delivered over the Water District's lines, is paid for pursuant to a 1945 contract among, *inter alia*, the United States, Edison, and the Water District. Under that contract Edison agreed to take a portion of the unused firm energy allocated to the Water District at specified rates to be paid to the United States for the credit of the Water District. App. A, *infra*, pp. 19–20.

The Commission also held that Part II of the Power Act was intended to give it jurisdiction over all sales at wholesale in interstate commerce without requiring a determination in each case as to whether the interests of more than one state are involved (R. 848–851). In addition, it rejected contentions that Section 6 of the Boulder Canyon Project Act, 45 Stat. 1056, 1061, as amended, 43 U.S.C. 617e, divested the Commission of jurisdiction over sales at wholesale by Edison to Colton; that the exception of local distribution facilities in Section 201(b) of the Power Act precluded jurisdiction over these sales; and that it should decline to exercise rate jurisdiction on the basis of alleged *de minimis* considerations (R. 844–847, 854–856, 863–864).

Having concluded that Edison's sales at wholesale to Colton had been subject to Commission jurisdiction, the Commission ordered Edison to file the 1945 contract, under which it was making its sales to Colton on July 1, 1954 (the earliest date on which federal jurisdiction was determined), as the continuing effective rate schedule and to cease and desist from charging, demanding, or receiving from Colton any rates and charges in excess of the rate originally fixed in that contract unless and until such rate might lawfully be changed in accordance with the procedures set forth in Section 205(d) of the Power Act. It also required Edison to account for the monies collected by it from Colton on and after July 1, 1954, which were in excess of the amounts that would have been collected under the rate fixed in that contract; to establish a special reserve account for that excess, together with interest; and to file with the Commission its computations and accounting entries, together with a proposed plan for the disposition of the special reserve. (R. 856–860, 862–863, 867–868.) [1]

Petitions for rehearing (R. 870–891) challenging these conclusions, were denied on September 14, 1961 (R. 892–897).

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[1] Edison made the filings required by the order under review and then, on December 1, 1961, it tendered for filing pursuant to Section 205 of the Power Act, 16 U.S.C. 824d, a new rate schedule increasing its rate for sales at wholesale to the City of Colton above the level it had previously been collecting. After a five month period of suspension, the new rate became effective, subject to refund, on June 1, 1962.

The court below, by a divided vote (Circuit Judge Browning dissenting), set aside the Commission's order solely on the ground that the Commission has no authority under Section 201(b) of the Power Act to regulate Edison's sale at wholesale to the City of Colton. In reaching this conclusion, the court assumed the correctness of the Commission's finding that the sale was in interstate commerce. It concluded, however, that, despite the express grant of jurisdiction to the Federal Power Commission in Section 201(b) "with respect to the sale of electric energy at wholesale in interstate commerce", the scope of this jurisdictional grant was limited by the language of Section 201(a) (the preamble to Part II of the Power Act) which states that Federal regulation is "to extend only to those matters which are not subject to regulation by the States."

Concluding that Part II of the Power Act was enacted to fill the gap of regulatory authority over interstate sales resulting particularly from the Court's decision in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83, the majority below interpreted that decision and related decisions of this Court as excluding state jurisdiction of sales at wholesale only in those situations where there was a "multi-state concern with the regulation in question and conflicting state interests in the rate charged" (App. A, *infra*, p. 25). Cases in this Court subsequent to the enactment of Part II of the Federal Power Act stating that the Commission's jurisdiction extends to all wholesale sales in interstate commerce

were limited to their particular facts—which, the court believed, showed a conflict between state interests. Having thus concluded that federal jurisdiction under the Power Act depends in each case upon the existence of a present multi-state concern in the sale being regulated, the court found that only California had an interest in the sales by Edison to Colton because "the original sale for interstate transmission is under federal control and no other state is affected in any way by regulation of the subsequent transaction." App. A, *infra*, p. 35.

The dissenting opinion declares that the decision below is inconsistent with a long line of cases in this Court and the courts of appeals reading Section 201(b) as granting the Federal Power Commission jurisdiction over all sales at wholesale in interstate commerce, without any requirement of showing a present interstate conflict with respect to the particular transaction sought to be regulated.

REASONS FOR GRANTING THE WRIT

The holding that the Federal Power Commission's jurisdiction over the rates charged for interstate power sales at wholesale depends upon a specific case-by-case showing of a national interest in the sale, arising out of an existing or potential multi-state conflict, is in direct conflict with decisions of this Court and the courts of appeals under the Federal Power Act and under the parallel provisions of the Natural Gas Act. Moreover, in requiring, as a condition of federal regulation, a Commission determination that

there is a discrete national interest in each particular interstate sale of power at wholesale, the court of appeals has adopted a standard which would seriously impede effective regulation of interstate wholesales of electric energy at the very time when the rapidly increasing integration of the nation's power resources makes the availability of comprehensive federal regulation a matter of particular moment.

1. Section 201(b) of the Federal Power Act expressly provides that Parts II and III of that Act, "shall apply * * * to the sale of electric energy at wholesale in interstate commerce." *Infra*, App. C, p. 44. The court below assumed that Edison's sale to the City of Colton met this test, but nonetheless ruled against Commission jurisdiction because it believed that no State other than California had any interest therein and that California's Public Utilities Commission should therefore regulate the rate, rather than the Federal Power Commission. It reasoned that federal jurisdiction is only to be exercised in those situations where this Court had held, prior to the 1935 enactment of Part II of the Federal Power Act, that the individual States were without power to act, and it interpreted those decisions as holding that only a multi-state interest in a particular sale precludes the State in which the sale takes place from exercising authority thereover.

As the dissenting opinion of Judge Browning observes, *infra*, App. A, pp. 36–41, it is far too late to define the Federal Power Commission's authority over sales at wholesale in interstate commerce by a

restricted reading of this Court's decision in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83. For while the legislative history of both Part II of the Federal Power Act and of the similar provisions of the 1938 Natural Gas Act, 52 Stat. 821–833,[2] show that the primary purpose of Congress in giving the federal Commission jurisdiction over the sale of interstate power at wholesale was to close the "Attleboro gap," the Court has subsequently made clear on repeated occasions that the jurisdiction which Congress gave the Federal Power Commission to achieve this objective encompassed *all* wholesale sales of electric energy and natural gas in interstate commerce and not just those involving

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[2] As the court below recognized, the two Acts, as originally enacted, have been recognized as interchangeable with respect to the Commission's jurisdiction over sales of gas or electric energy in interstate commerce for resale. Compare Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b), with Section 201(b) of the Federal Power Act. See, *e.g.*, *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U.S. 61, 69; *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, 472–474; *Wisconsin-Michigan Power Co.* v. *Federal Power Commission*, 197 F. 2d 472 (C.A. 7), certiorari denied, 345 U.S. 934. In fact, the Natural Gas Act was originally introduced as a proposed Title III to the Public Utility Holding Co. Act of 1935, 49 Stat. 838, of which Parts II and III of the Federal Power Act were Title II. See H.R. 5423, 74th Cong., 1st Sess. as introduced February 6, 1935. The only significant difference is that the Power Act adds a requirement, not present in the Gas Act, that before a company becomes a "public utility", and hence subject to rate regulation under Sections 205 and 206 of the Act, it must (as Southern California Edison admittedly does here) own facilities for the jurisdictional transmission or sale of electric energy.

some definable "national" interest or conflicts between the States. *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498, 506–508; *Colorado-Wyoming Gas Co.* v. *Federal Power Commission*, 324 U.S. 626, 629–631; *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 514–517; *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, 473; *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329; *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U.S. 414, 418; *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 303–04, 307–08, 311; *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 682–683; see *Hartford Electric Light Co.* v. *Federal Power Commission*, 131 F. 2d 953, 964 (C.A. 2), certiorari denied, 319 U.S. 741; *Wisconsin-Michigan Power Co.* v. *Federal Power Commission*, 197 F. 2d 472 (C.A. 7), certiorari denied, 345 U.S. 934; *Wisconsin* v. *Federal Power Commission*, 201 F. 2d 183, 185 n. 1 (C.A.D.C.), certiorari denied, 345 U.S. 934. "Congress," the Court concluded in the *Public Utilities Commission of California* case, *supra*, 345 U.S. at p. 308, "interpreted [*Attleboro*] as prohibiting state control of wholesale rates in interstate commerce for resale, and so armed the Federal Power Commission with precisely that power." "The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or

otherwise." *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana, supra,* 332 U.S. at p. 517.

The lower court's suggestion that these repeated rulings can be rejected as dicta not applicable to situations where the first interstate sale is subject to Commission or other federal authority is unsound. None of the cases suggests that the language was of limited applicability; indeed, *Illinois Natural Gas. Co.* v. *Central Illinois Public Service Co., supra,* the case in which the broad scope of the Commission's jurisdiction over wholesale rates was first enunciated, involved, like the present case, the Commission's authority over wholesale transactions within a State subsequent to a prior interstate sale of the gas.[3] See, also, *Wisconsin* v. *Federal Power Commission,* 201 F. 2d 183, 185 n. 1, (C.A.D.C.), certiorari denied, 345 U.S. 934, where the factual situation was almost identical to the one presented here.

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[3] In the *Illinois* case, Chief Justice Stone, speaking for a unanimous court, expressly rejected the concept that federal or state jurisdiction over sales should be determined by determining "whether the interest of the state in the present regulation of the sale and distribution of gas transported into the state, [should be] balanced against the effect of such control on the commerce in its national aspect" (314 U.S. at p. 506) since Congress had adopted the Natural Gas Act "to bring under federal regulation wholesale distribution * * * of gas moving interstate" (314 U.S. at p. 508).

The language from that opinion as to "matters which materially affect interstate commerce" quoted by the court below (App. A, *infra,* p. 31) related to the power of Congress under the Commerce Clause to provide the regulation there held to supersede the state regulatory power. The Court did not pass on the question of state power in the absence of federal action. 314 U.S. at p. 509.

The language in *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U.S. 515, 525, upon which the court of appeals relied is, we believe, inapposite. The company over which the Commission there attempted to exercise jurisdiction as a "public utility" made no sales for resale at the time of the Court's decision, and the only question considered by the Court was whether the "facilities" of the company, which the Commission had held were facilities for "transmission of electric energy in interstate commerce," came within the statutory exemption of "facilities used in local distribution." The Court remanded the case for further findings on that question. There was no suggestion that sales for resale of power from a multi-state combination of power sources and flowing over high voltage lines of the seller to the facilities of the purchaser were not subject to the jurisdiction of the Federal Power Commission. On the contrary, the Court expressly noted (324 U.S. at p. 526) "the purpose [of Congress] to give federal jurisdiction to regulate rates of wholesale transactions, but not to give jurisdiction over local rates."[4]

[4] The suggestion that *Connecticut Light and Power Co.* v. *Federal Power Commission*, *supra*, superimposed a test of national interest on each assertion of Commission jurisdiction was expressly rejected in *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, 473. There, this Court upheld Commission jurisdiction based on the transportation of gas wholly within the consuming state after a sale subject to Commission jurisdiction at the state boundary. The Court held that the case was controlled by the holding in *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498, that "Congress subjected to federal regulation a company transporting interstate gas, and selling it for resale, wholly within one state."

Nor can the decision below be supported by reference to the policy declaration in Section 201(a) of the Federal Power Act, *i.e.*, that the federal regulation for which Congress found need was regulation "to extend only to those matters which are not subject to regulation by the states." For this Court has explicitly held that this policy declaration "cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose." *Connecticut Light and Power Co.* v. *Federal Power Commission, supra,* 324 U.S. at p. 527. And the Court has added with particular reference to the present problem (*United States* v. *Public Utilities Commission of California,* 345 U.S. at p. 311):

> * * * To conceive of it now as a bench mark of the Commission's power, or an affirmation of state authority over any interstate sales for resale, would be to speculate about a congressional purpose for which there is no support.

2. The decision below, if permitted to stand, will have serious impact upon the Commission's regulatory program. Coming as it does at the very time when the rapid integration of the nation's power grid made possible by the development of high voltage transmission lines and the pooling of vast sources of supply is erasing the significance of state boundaries, the court of appeals' holding is bound to engender confusion and to create a cloud upon the Commission's authority—one which we believe should be dissipated as promptly as practicable.

At best, as Judge Browning pointed out in dissent, the case-by-case determination of whether there is a sufficient national interest in each particular sale to warrant federal control can "only create troublesome problems" leading to complications and delay. This is particularly true since more than half of the approximately 1,500 wholesale sales now covered by rate schedules on file with the Commission pursuant to the Power Act are for sales at wholesale made after a Commission-regulated sale at the boundary of or within the same State.

Even more important, the Ninth Circuit's approach would leave to the States matters with which they cannot effectively deal. Because of the complexities of interstate power systems, interstate wholesalers of electrical energy are "entirely beyond the reach of the States * * * either legally or practically". (S. Rep. No. 621, 74th Cong., 1st Sess., p. 17). So Congress spoke in 1935, when it enacted Part II of the Federal Power Act. A quarter-century of technological improvement and industry development has served only to provide added proofs.

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CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted.

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FEBRUARY 1963.

APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 17608. Nov. 15, 1962

SOUTHERN CALIFORNIA EDISON COMPANY, PETITIONER,

vs.

FEDERAL POWER COMMISSION, RESPONDENT.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, PETITIONER,

vs.

FEDERAL POWER COMMISSION, RESPONDENT.

UPON PETITION TO REVIEW AND SET ASIDE ORDERS OF THE FEDERAL POWER COMMISSION

Before: CHAMBERS, MERRILL and BROWNING, Circuit Judges.

MERRILL, Circuit Judge.

This case concerns the right of the Federal Power Commission to regulate the rates at which Southern California Edison Company sells power at wholesale to the City of Colton, California. The commission asserts its right under § 201 of the Federal Power

Act, 16 U.S.C. § 824, the pertinent portions of which are set forth in the margin.[1]

The City of Colton is a community of approximately eighteen thousand persons located near San Bernardino in Southern California. Colton's municipal electric utility system purchases all of its energy from Edison under a contract dated October 1, 1945. The contract was filed with the California Public Utilities Commission and the state commission has exercised jurisdiction over all of Edison's sales to Colton since that time. In the exercise of its jurisdiction, the state commission has, over the protest of Colton, authorized increases in Edison's charges.

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[1] "(a) It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in sections 824–825r of this title and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

"(b) The provisions of sections 824–824h of this title shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in said sections, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."

On May 9, 1958, Colton filed a petition requesting the Federal Power Commission to assert jurisdiction over the rates charged by Edison. The basis of the petition was that interstate energy was sold to Colton at wholesale and that the rates were therefore subject to Federal Power Commission control under § 201(b) of the Federal Power Act. The petition was opposed by Edison and by the California Public Utilities Commission.

Following hearings before the Federal Power Commission, that commission concluded that it had jurisdiction to regulate the rates in question and entered its order requiring Edison, among other matters, to file its rate schedules and to account for all moneys collected in excess of its July, 1954, rates. Edison has petitioned this court to review and set aside the commission's order. The California commission has joined in that petition.

Edison markets electric energy in central and southern California. It markets no energy outside of the state. It owns and operates a number of steam and hydroelectric generating stations within the state.

Edison also purchases energy generated out-of-state at Hoover, Davis and Parker Dams on the Colorado River. Part of this energy was allocated to Edison by the United States Bureau of Reclamation from Hoover Dam generators in Arizona. In 1958 this source accounted for six per cent of the total electric energy handled by Edison, but none of it was traced to the City of Colton. The remainder of Edison's out-of-state energy supply comes from the Metropolitan Water District of California pursuant to a contract entered into in 1945 to which the United States, acting through the Secretary of the Interior, was a party. Under that contract Edison agreed to take a

portion of the district's unused firm energy at specified rates to be paid to the United States for the credit of the district. A collateral contract to which the United States was not a party provided, among other things, for the transmission of this energy over the district's lines to the district's Camino switching station in California and thence by connection to Edison's 220 kv transmission system at Hayfield in California. It is some of this energy that the commission determined reaches the City of Colton, passing from Hayfield to Edison's Highgrove substation to Colton.[2]

It is apparent that authority over the initial sale to Edison in Nevada is not in issue, for the United States controls the allocation of the supply and, as a party to the resale contract, can oversee the rates. The controversy is confined to the conflicting claims of authority to regulate the wholesale rate to Colton asserted by California and the Federal Power Commission.

Federal Power Commission contends that under § 201(b) it has exclusive authority to regulate rates of all wholesale sales of interstate power. Edison contends that the extension of federal regulation to the rate to Colton would encroach upon subject matter specifically left to regulation by the states under § 201 (a) and (b) as read together in the light of Pub-

[2] This finding is strongly contested. Edison also contends that power generated at Hoover Dam does not fall under § 201, since the Boulder Canyon Project Act, 43 U.S.C. § 617, et. seq., applies, and that under the provisions of that act Federal Power Commission is excluded from control over such power. This issue and the factual issue as to whether Hoover power actually reaches Colton we do not decide. For the purposes of our decision, we assume both issues to be determined in favor of Federal Power Commission and Colton.

lic Utilities Commission vs. Attleboro Steam & Electric Co., 1927, 273 U.S. 83. These opposing contentions present the issue before us.

Legislative and judicial histories seem to us to make clear the intent and purpose of § 201 (a) and (b). It was intended that states should continue to regulate where such regulation is constitutionally permissible under the commerce clause.

Passage of § 201 (a) and (b) was necessitated by the decision in the Attleboro case in 1927. A regulatory void was created by that decision which it was necessary that Congress fill. That case concerned the attempt of the Rhode Island Commission to regulate the rate at which a local producing company sold power at the Rhode Island border to the Attleboro Company for resale in Massachusetts. The court recognized that, although both Rhode Island and Massachusetts had an interest in the rate charged, their interests were essentially in conflict. In this situation the court held that neither Rhode Island nor Massachusetts could regulate the rate in question without violating the commerce clause; that regulation could only be attained through congressional action. Since Congress had not acted, a regulatory void or gap resulted.

That § 201 (a) and (b) was intended to go no further than to fill the "Attleboro gap" is clear from legislative history. Senate Report No. 621, 74th Congress, First Session, p. 48, states in part:

> Subsection (a) * * * declares the policy of Congress to extend that regulation to those matters which cannot be regulated by the States and to assist the States in the exercise of their regulatory powers, but not to impair or diminish the powers of any State commission.

That report also provides at page 48:

> The revision has also removed every encroachment upon the authority of the states. The revised bill would impower federal regulation only over those matters which cannot effectively be controlled by the states. The limitation on the Federal Power Commission's jurisdiction in this regard has been inserted in each section in an effort to prevent the expansion of federal authorty over state matters.
>
> * * * * *
>
> The rate-making powers of the Commission are confined to those wholesale transactions which the Supreme Court held in Public Utilities Commission v. Attleboro Steam & Electric Co. (273 US 83) to be beyond the reach of the states.

The Supreme Court also has recognized that § 201 (a) and (b) has such limited application. In Connecticut Light and Power Company vs. Federal Power Commission, 1945, 324 U.S. 499, at 524, the court refers to its earlier decision in Jersey Central Power and Light Company vs. Federal Power Commission, 1943, 319 U.S. 61, in this language:

> We held that the "primary purpose" of the 1935 amendments to the Power Act was to give the Power Commission control of sales of energy across state lines which had been held to be beyond the control of the state of export in Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U.S. 83.

In determining the extent of the regulatory void created by Attleboro, however, (and the consequent scope of federal authority) we must take the holding as Congress would have understood it as of that date. In Phillips Petroleum Company vs. Wisconsin, 1954,

347 U.S. 672, 684, the Supreme Court stated, dealing with a similar problem under the Natural Gas Act:

> But it is well settled that the gap referred to is that thought to exist at the time the Natural Gas Act was passed, and the jurisdiction of the Commission is not affected by subsequent decisions of this Court which have somewhat loosened the constitutional restrictions on state activities affecting interstate commerce, in the absence of conflicting federal regulation.[2]

Federal Power Commission contends that the Attleboro holding was founded upon the distinction between wholesale and retail sales of interstate power; that under that holding any state regulation of interstate power at wholesale must fall as in violation of the commerce clause.

While the court did lay emphasis upon this distinction, the issue is not so simple in its solution. The question may be posed thus: Under Attleboro can it be said that in absence of federal regulation this sale to Colton would have to go unregulated by California merely because it was wholesale; and in the face of the fact that California is the only state having any concern with it? Or it may be asked: Under Attle-

[2] The jurisdictional language of the Natural Gas Act and the Power Act is essentially the same. The Natural Gas Act does not contain the express admonition that Congress intended federal regulation "to extend only to those matters which are not subject to regulation by the States." However, this Court has held that the presence of the express language in one and its absence from the other does not affect the parallel interpretation to be given the two Acts in light of the fact that the same purpose clearly appears in the legislative history of both Acts with their constant reference to Pennsylvania Gas, Kansas Gas and Attleboro. FPC vs. Arizona Edison Co., 9 Cir., 1952, 194 F. 2d 679, 682. For the legislative history of the Natural Gas Act, see H.R. Rep. No. 709, 75th Cong., 1st Sess. (1937).

boro can a determination be attributed to Congress, through its failure to regulate this sale, that such sale should go unregulated?

The references to wholesale and retail in Attleboro must be read in context. In that case, one side relied upon Pennsylvania Gas Company vs. Public Service Commission, 252 U.S. 23; the other relied upon Missouri vs. Kansas Gas Company, 265 U.S. 298. The court in Attleboro stated, at page 87:

> * * * the controlling question presented is whether the present case comes within the rule of the *Pennsylvania Gas Company* case or that of the *Kansas Gas Company* case upon which the Attleboro Company relies.

In both those cases, as in Attleboro, there was continuous transmission of power across a state line with the selling company doing business with customers on both sides of that line. The regulation which the sending (Attleboro) or receiving (Pennsylvania Gas) state or both (Kansas Gas) sought to impose could bear upon the ability of the selling company to serve its customers in the other state. The interstate conflict of interest was actual in Kansas Gas while only potential in Pennsylvania Gas and Attleboro, but in all three a multi-state concern with a particular transaction was essential to the factual setting of the case.

In Pennsylvania Gas the sales were retail sales by the transmitting company. In Kansas Gas the sales were at wholesale to distributing companies in the receiving state.

In Pennsylvania Gas it was held that in absence of federal regulation the rates at which the transmitting company sold at retail were subject to regulation by the consuming state, since such retail sales

amounting to local distribution, were essentially local in character.

In Kansas Gas the court held the regulation by both states to be a direct burden on interstate commerce and that the sale and delivery to the distributing companies was "an inseparable part of a transaction in interstate commerce—not local but essentially national in character * * *."

In those two cases, as in Attleboro, there being a multi-state concern with the regulation in question and conflicting state interests in the rate charged, the regulation upon its face would appear to be essentially national. If it was to escape the commerce clause, it was necessary to show that notwithstanding the national interest, the local character should prevail. It was under these circumstances that the determining factor upon the local or national dichotomy became the question of whether the interstate sales were at wholesale or retail.

In the case at bar, however, the sale from which the interstate transmission springs is already under federal control through federal sale of the power to the Metropolitan Water District and direct federal participation in the resale to Edison. Any conceivable conflict of interest among Arizona, Nevada and California with respect to the operation of Colorado River plants and the allocation of energy from them is thus totally subject to federal regulation through the United States' position as lessor of the generators at Hoover, Parker and Davis.[4] The only other possibility of multi-state concern with the Edison-Colton sale would seem to rest upon Nevada's desire to protect Edison's customers in that state through securing for them the rate benefit

[4] See 26 F.P.C. 223, 229–230 (1961).

which a profitable rate to Colton would permit. This possibility is nullified by the fact that Edison's sales are all within California. Nevada has no resident customers to protect. While this situation might be subject to change were Edison to begin to operate as a public utility in Nevada, Edison has never so operated in the past and has no present plans to expand its sales beyond the borders of the southern portion of California. It would be pure speculation to predict that it will serve Nevada in the future.

The lack, in this case, of any interstate conflict of interest not already subject to federal regulation is, we feel, decisive. It is one thing to say that where more than one state will feel the impact of a regulation of interstate energy, the states may regulate only sales at retail, since sales at wholesale under these circumstances remain essentially national rather than local. It is quite another thing to say, as does the Federal Power Commission, that all sales at wholesale are essentially national, irrespective of a complete lack of interest on the part of any other state.

Attleboro, as we read it, does not say this. The multi-state impact of the regulation there in question is clearly pointed out. The court states, at page 90:

> Furthermore, if Rhode Island could place a direct burden upon the interstate business of the Narragansett Company because this would result in indirect benefit to the customers of the Narragansett Company in Rhode Island, Massachusetts could, by parity of reasoning, reduce the rates on such interstate business in order to benefit the customers of the Attleboro Company in that State, who would have, in the aggregate, an interest in the interstate rate correlative to that of the customers

> of the Narragansett Company in Rhode Island. Plainly, however, the paramount interest in the interstate business carried on between the two companies is not local to either State, but is essentially national in character. The rate is therefore not subject to regulation by either of the two states in the guise of protection to their respective local interests; but, if such regulation is required it can only be attained by the exercise of the power vested in Congress.

Attleboro does not stand in isolation upon this problem of state power to regulate interstate commerce. When it was handed down, it was but the last in a long series of cases bearing upon the problem.

Prior to Attleboro, commencing with Cooley vs. Board of Port Wardens, 1851, 53 U.S. (12 How.) 298, the Supreme Court had dealt with the matter of state regulation from a very practical point of view. Regulation which might at first blush clearly appear to have a very direct impact on what was concededly interstate commerce had been held in absence of federal regulation to be within the regulatory power of the state, for the reason that although some regulation was clearly required, Congress had failed to act. These were cases in which the concern was local, the need for regulation was due to local conditions and the service was not such as to demand uniformity of regulation among the states, but was, rather, such as to permit of a diversity of regulation. Under these circumstances, the burden upon commerce which the state regulation constituted was held to be an indirect one and within the area in which state power to regulate existed concurrently with federal power until such time as Congress occupied the field.

This is illustrated, for example, by language in The Minnesota Rate Cases, 1912, 230 U.S. 352. On page

396 the court points out the distinction between the impact of a direct and an indirect burden:

> If a state enactment imposes a direct burden upon interstate commerce, it must fall regardless of Federal legislation. The point of such an objection is not that Congress has acted, but that the State has directly restrained that which in the absence of Federal regulation should be free.

The court goes on to state, at page 3[illegible]:

> The grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the States with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation.

and further, at pages 402–403:

> But within these limitations there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention

> that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the Government because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction but rather that the States should continue to supply the needed rules until Congress should decide to supersede them. * * * Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action.

Can it be said that this prior judicial concern with the local need for regulation of interstate commerce has been laid to rest in Attleboro; and that by that opinion there is substituted for all the considerations theretofore regarded as relevant and irrespective of any multi-state concern (in the power area, at least) the simple mechanical test of wholesale-or-retail? Can it be said that Congress would have so construed Attleboro? We think not.[8]

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[8] Congress was well aware of the Supreme Court's interpretation of the commerce clause as is illustrated by Senator Wheeler's remarks on the constitutionality of the Holding Company part of the bill. He stated: "The criterion of constitu-

The cases relied upon by the Federal Power Commission to sustain their jurisdiction are distinguishable because they all involved a possible conflict of interest among two or more states without any federal regulatory authority in a position to resolve such conflicts by controlling the equitable distribution of either

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tionality of this bill is the existence of the Federal power (U.S. v. D. & H. Co., 213 U.S. 366). The Federal power over a given subject may be concurrent with that of the States or it may be exclusive, depending on the nature of the subject to be regulated.

"In Hall v. DeCuir (95 U.S. 487), the Court said:

"'* * * The States regulate, as a matter of domestic concern, the instruments of commerce situated wholly within their own jurisdictions and over which they have exclusive governmental control, except when employed in foreign or interstate commerce. As they can only be used in the State, their regulation for all purposes may properly be assumed by the State until Congress acts in reference to their foreign or interstate relations. * * * (Examples are found in the regulation of railroads by the States. See Minnesota Rate Cases, 230 U.S. 352)'

"In Cooley v. Philadelphia (12 How. 299) the Court said:

"'Whatever subjects of this power (over commerce among the several States) are in their nature national, or admit only of one uniform system or plan of regulation may justly be said to be of such a nature as to require exclusive legislation by Congress.' (An example is interstate transportation of natural gas not regulated by Congress, but nevertheless held in Oklahoma v. Kansas, etc., Gas Co. (221 U.S. 229), to be free from State regulation.)

"Certain features of the business of the utility holding and subsidiary operating companies would seem to be of this latter type, and since the business is of an interstate nature, no doubt Federal power exists, and the question is really one as to whether that power is exclusive, or whether, because many instruments of this commerce are local, the power is to be exerted only and to the extent that such instruments are employed in interstate commerce."

the power supply or the power charges among the states concerned. Illinois Natural Gas Company vs. Central Illinois Public Service Co., 1942, 314 U.S. 498, was a case in which the local gas company, which claimed exemption from state public utilities commission jurisdiction, was a wholly owned subsidiary of an interstate pipeline company. Its function in this interstate system was to receive the gas at the state border, reduce its pressure and transport it to local distributors. In issue was an order of the state commission requiring the local wholesaler to construct facilities to serve a local distributing company not presently supplied by it with natural gas. The state commission was held to be without power to issue such an order because "the proposed extension of appellant's facilities is so intimately associated with the commerce, and would so affect its volume moving into the state and distribution among the states, as to be within the Congressional power to regulate those matters which materially affect interstate commerce, as well as the commerce itself." 314 U.S. 498, 509.

In Federal Power Commission vs. East Ohio Gas Company, 1950, 338 U.S. 464, the company which the Federal Power Commission sought to subject to its jurisdiction was also, as in Illinois Gas, a subsidiary of an interstate pipeline company distributing gas wholly within one state. Jurisdiction over wholesale rates was not in issue since East Ohio sold gas direct to consumers. Although retail sales only were at stake, Federal Power Commission authority to require East Ohio to keep accounts and submit reports was upheld by finding that East Ohio's facilities were not entitled to the exemption granted facilities used for local distribution since they were part of an interstate chain of large high-pressure lines which had to

be nationally controlled in order to preserve "'equality of opportunity and treatment among the various communities and States concerned.'" 338 U.S. 464, 471, quoting Kansas Gas, supra, 265 U.S. 298, 310.*

Finally, in United States vs. Public Utilities Commission of California, 1953, 345 U.S. 295, the court fused Part I, § 20, of the Power Act with § 201 by deciding that states were forbidden to regulate sales of hydroelectric power for resale in interstate commerce, even if the source of some portion of the power sold originated in federally licensed hydroelectric projects. The sweeping statements by the court that § 201 left no authority in the states over interstate sales for resale must be read within the factual framework of the case. The dispute between the state public utilities commission and the Federal Power Commission over the right to control the rates at which a

* Both of the foregoing cases (as is also true of Jersey Central and Connecticut Light & Power, discussed infra) deal with Federal Power Commission regulation of matters other than the rates at which power is sold, matters over which the scope of federal authority is broader because of the specific federal interests and statutory provisions involved. The court in Illinois Natural Gas Company dealt with the extension of facilities for the transportation of natural gas and relied heavily upon the explicit expression of federal concern with that subject contained in 15 U.S.C. § 717(f). 314 U.S. 498, 505-508. In East Ohio Gas Company the focus was on federal control under 15 U.S.C. § 717(b) of "transportation of natural gas in interstate commerce" as opposed to the "local distribution of natural gas or to the facilities used for such distribution." Any transmission of energy across state lines automatically has multi-state impact with respect to allocation of energy supply, but that particular object of federal concern is effectively handled in this case by the control the United States exercises over which parties receive power from Hoover, Parker and Davis Dams.

California electric company marketing most of its power in that state sold power to the Navy Department and a Nevada county for use in Nevada. Once again a multi-state concern was present since both Nevada and California regulatory agencies were interested in protecting their own citizens. Similarly, the federal government was concerned in keeping the rates at the lowest possible level for Navy use. Indeed, the dispute arose precisely because the company attempted to require the Navy and the Nevada county to adhere to a new schedule of increased rates granted by the California commission.

If the court's broad declarations (that the entire field of interstate wholesale transactions of electric energy was placed under the Federal Power Commission's jurisdiction) are to be held controlling apart from their factual context, federal regulation would govern the rates of sales between two companies wholly engaged in intrastate business and of concern to no state other than the one in which they occur. For example, in this case, were Colton to have some unused energy which it desired to sell to a nearby community such as San Bernardino for distribution to local consumers, the Federal Power Commission could intervene to set the rate of that sale regardless of the fact that only the two communities would be affected by the rate. Subsequent resales by San Bernardino to Riverside and by Riverside to Pomona would be equally subject to federal regulation although any interstate interest would be lacking. No case has yet presented such a set of circumstances to the court. We do not feel that it would go so far as to extend the language of Public Utilities Commission of California to the circumstances described above, especially in the light of its opinion in Connecticut Light & Power Co., discussed infra.

Thus, in each of these cases, as well as in the Attleboro triad, an interstate conflict of interest was prominent on the facts. When this conflict, which was the essence of the national character of the regulation at stake, was coupled with the lack of any federal supervision of the conflict, the need for federal intervention, spelled out by § 201, was clear.

The significance of the presence of some form of federal control where multi-state concern with a power transaction for resale in interstate commerce exists may be seen in the contrasting cases of Jersey Central Power & Light Co. vs. Federal Power Commission, 1943, 319 U.S. 64, Connecticut Light & Power Co. vs. Federal Power Commission, 1945, 324 U.S. 515 (cases dealing not with rate regulation, but with other subjects of power commission jurisdiction). In Jersey Central one of the issues was whether the company was a public utility within the definition of the Federal Power Act as an owner or operator of facilities for the transmission of electric energy in interstate commerce. The company owned and operated transmission lines located wholly within New Jersey, but delivered substantial power to the Public Service Company which, in turn, delivered some of it to a New York company for consumption in New York. The company argued that the arrangements by which energy passed to New York did not make it a public utility because its transmission and sale of power to Public Service Company was an intrastate transaction. The court, interpreting § 201, said:

> The purpose of this act was primarily to regulate the rates and charges of the interstate energy. If intervening companies might purchase from producers in the state of production, free of federal control, cost would be fixed prior to the incidence of federal regu-

> lation and federal rate control would be substantially impaired, if not rendered futile. 319 U.S. 61, 71–72.

In Connecticut Light, the question was whether the Federal Power Commission had the right to regulate the accounting practices of a company whose facilities were used for local distribution of power. The power included electric energy purchased from another Connecticut concern but transmitted from Massachusetts. One of the company's customers was a municipality which resold a minute part of its purchase for export from the state. Federal control of the interstate conflict of interest potential in the transmission of Massachusetts power to Connecticut was already established, however, and in dispute was the necessity for extending it further to encompass the remainder of the company's business, which lacked any vital aspect of multi-state concern. The court distinguished Jersey Central by stating:

> Here, however, the federal authority to fix the sale price of the energy coming from Massachusetts in interstate commerce attaches and presumably has been or at least may be exercised pursuant to the Jersey Central holding before the energy reaches this company. What petitioner does or fails to do is only after the incidence of federal regulation and can in no way frustrate it. 324 U.S. 515, 524.

We conclude that a state may regulate an interstate sale for resale where, as here, the original sale for interstate transmission is under federal control and no other state is affected in any way by regulation of the subsequent transaction. We therefore find that the Federal Power Commission has no authority under § 201(b) to regulate the rate at which Edison sells to the City of Colton.

Accordingly, the order of the Federal Power Commission is hereby set aside.

BROWNING, Circuit Judge, dissenting,

As the Court states, the Federal Power Act was passed by Congress explicitly to fill the "regulatory gap" created by *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*[1] In *Attleboro* the Supreme Court interpreted its earlier decisions as sustaining state authority to regulate "the furnishing of gas to local consumers" in interstate commerce, but denying state power to regulate sales of gas "in wholesale quantities, not to consumers, but to distributing companies for resale to consumers."[2]

This, in any event, was the reading placed upon *Attleboro* by the Congress while considering the Act. It was repeatedly stated in the legislative proceedings that *Attleboro,* and the cases which it followed, had drawn the line separating federal and state constitutional authority between sales at "wholesale" or for "resale," on the one hand, and "local" sales at "retail" or to the "consumer," on the other.[3] The language of Section 201(b) reads naturally in terms of this distinction, stating that the Act is to apply to sales "at wholesale in interstate commerce" (defined as "sales for resale"), and is not to apply "to any other sale."

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[1] 273 U.S. 83 (1927).

[2] 273 U.S. at 88–89.

[3] The following are examples of these references, and also of descriptions of the statutory grant of power in the same terms: Hearings on H.R. 5423, House Comm. on Interstate and Foreign Commerce, 74th Cong., 1st Sess. (1935), pp. 96, 384, 402, 421 ff., 435, 497, 498, 518, 521 ff., 576, 1639, 1679, 2143, 2154; S.Rep. No. 621, 74th Cong., 1st Sess., pp. 17, 48; H.Rep. No. 1318, 74th Cong., 1st Sess., pp. 7, 26; 79 Cong. Rec., 74th Cong., 1st Sess. (1935), pp. 8431, 8444.

The Supreme Court has described the holding in *Attleboro* and its predecessors in terms of the same flat distinction between sales for resale and sales for consumption,[4] and has said that Congress so understood them in enacting the Federal Power Act. In *United States v. Public Utilities Commission* the Court said, "Congress interpreted that case [*Attleboro*] as prohibiting state control of wholesale rates in interstate commerce for resale, and so armed the Federal Power Commission with precisely that power."[5]

The courts have uniformly read Section 201 (b) as granting the federal Commission jurisdiction over all wholesales in interstate commerce, leaving control of sales at retail to the states.[6] Cases under the Natural Gas Act, concededly applicable here, are to the same effect. As the Supreme Court said in *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, "The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise."[7] It is indisputable that sales at

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[4] United States v. Public Util. Comm'n, 345 U.S. 295, 303 (1953); FPC v. East Ohio Gas Co., 338 U.S. 464, 470 n. 10 (1950); Panhandle E. Pipe Line Co. v. Public Serv. Comm'n, 332 U.S. 507, 514 (1947). See also Hartford Elec. Light Co. v. FPC, 131 F. 2d 953, 964 (2d Cir. 1942).

[5] United States v. Public Util. Comm'n, 345 U.S. 295, 308 (1953). See also Connecticut Power Co. v. FPC, 324 U.S. 515, 526 (1945). Cf. FPC v. East Ohio Gas Co., 338 U.S. 464, 471–73 (1950).

[6] United States v. Public Util. Comm'n, 345 U.S. 295, 311 (1953); Wisconsin v. FPC, 201 F. 2d 183, 185 n. 1 (D.C. Cir. 1952); Wisconsin-Michigan Power Co. v. FPC, 197 F. 2d 472 (7th Cir. 1952).

[7] Panhandle E. Pipe Line Co. v. Public Serv. Comm'n, 332 U.S. 507, 517 (1947). See also Phillips Petroleum Co. v.

retail in interstate commerce were made subject to regulation by the state and are beyond the jurisdiction of the federal Commission even though conflicting state interests might be involved.[8] It seems clear that a similarly unqualified grant of exclusive jurisdiction over sales at wholesale in interstate commerce was vested in the Commission.

This sharp and simple division of regulatory power was not conditioned by the declaration of Section 201(a) that federal regulation is "to extend only to those matters which are not subject to regulation by the States." This general declaration of policy would be revelant "in resolving any ambiguity or indefiniteness in the specific provisions" of the Act, but it "cannot nullify a clear and specific grant of jurisdiction."[9] Before Congress it was "spoken of only as protecting state regulation of local affairs, including rates of intrastate and interstate-for-consumption sales."[10] "To conceive of it now as a benchmark of the Commission's power, or an affirmation of state authority over any interstate sales for resale, would

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Wisconsin, 347 U.S. 672, 682–84 (1954); Panhandle E. Pipe Line Co. v. Michigan Pub. Serv. Comm'n, 341 U.S. 329, 334 (1951); Illinois Natural Gas Co. v. Central Illinois Pub. Serv. Comm'n, 314 U.S. 498, 506–08 (1940).

[8] Panhandle E. Pipe Line Co. v. Michigan Pub. Serv. Comm'n, 341 U.S. 329 (1951); Panhandle E. Pipe Line Co. v. Public Serv. Comm'n, 332 U.S. 507 (1947). This, as the court points out, was true in Pennsylvania Gas Co. v. Public Serv. Comm'n, 252 U.S. 23 (1920).

[9] Connecticut Light & Power Co. v. FPC, 324 U.S. 515, 527 (1945). See also United States v. Public Util. Comm'n, 345 U.S. 295, 310 (1953).

[10] United States v. Public Util. Comm'n, 345 U.S. 295, 309 (1953).

be to speculate about a congressional purpose for which there is no support." [11]

Of course "literalness may strangle meaning," [12] and a statute is to be read in the light of its purpose. But fixing a clear and certain boundary between federal and state jurisdiction to regulate interstate sales of power, so that its precise location need not be fought out case by case in litigation, is in itself an important objective of legislative policy. As has been said of the parallel provisions of the Natural Gas Act, "Congress undertook to regulate a defined class of natural gas distribution, without the necessity, where Congress had not acted, of drawing the precise line between state and federal power by the litigation of particular cases." [13]

To hold that sales of power at wholesale in interstate commerce are not subject to federal Commission jurisdiction unless they involve an "interstate conflict of interest not already subject to federal regulation," can only create troublesome problems.[14] Since an

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[11] 345 U.S. at 311.

[12] Utah Junk Co. v. Porter, 328 U.S. 39, 44 (1946).

[13] Illinois Natural Gas Co. v. Central Illinois Pub. Serv. Comm'n, 314 U.S. 498, 507-08 (1949). See also Wisconsin v. FPC, 201 F.2d 183, 185 n. 1 (D.C.Cir. 1952).

[14] In Illinois Natural Gas Co. v. Central Illinois Pub. Serv. Comm'n, 314 U.S. 498, 502, 508 (1940), the Court suggests that the federal Commission's authority extends to sales of gas for resale following other sales for resale of the same energy which are within the Commission's jurisdiction. The same understanding of the coverage of the Act is reflected in Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 682 n. 10 (1954), where the court refers to the comment of the General Solicitor of the National Association of Railroad and Utilities Commissioners that the purpose of certain changes, ultimately included in the Act was "to make certain that the bill will apply to all intercompany sales of nautral gas at wholesale, even though

existing conflict between state regulatory agencies is not a prerequisite to jurisdiction of the federal Commission,[15] it is not clear why an existing (rather than potential) conflict of state interests should be required. Further, it is not clear whether the extent of the conflict of interest is relevant: would federal jurisdiction attach to the Colton contract if Edison sold one Nevada customer a small amount of power; if not, how much more would be required? Would it make a difference if power sold by Edison in a state other than California were also traceable to a federal generator so that the first sale was controlled by an agency of the federal government? If at some future time federal jurisdiction were to attach to the Colton contract because of sales of power by Edison in states other than California, would the federal jurisdiction over the Colton contract be dependent upon continuance of these sales? Does the requirement of interstate conflict also apply to federal jurisdiction over interstate transmission; or is it limited to interstate sales?[16] And if no existing conflict of interest between states is involved, is the interstate sale to be left unregulated if the state concerned does not undertake to regulate it?

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the sale be from one company to another company which will resell to another corporation before the gas is finally sold to the public." Hearings before House Comm. on Interstate and Foreign Commerce on H.R. 4008, 75th Cong., 1st Sess. 22.

[15] Only California had sought to regulate the rates involved in United States v. Public Util. Comm'n, 345 U.S. 295 (1953). In that case, as in this, Nevada withheld a potential claim to regulatory jurisdiction.

[16] The Court's discussion of Illinois Natural Gas Co. v. Central Illinois Pub. Serv. Comm'n, 314 U.S. 498 (1942), and FPC v. East Ohio Gas Co., 338 U.S. 464 (1950), suggests as much, though it is difficult to find a basis for such a distinction in the statute itself.

If it is desirable that regulation of contracts like that with Colton be left to the state, the task of modifying Section 201(b) to accomplish that purpose is one for Congress. Congress could move the jurisdictional line without obscuring it; Congress could require state-by-state assumption of regulatory responsibility before federal controls were withdrawn.[17]

(Endorsed) Opinion and Dissenting Opinion Filed Nov. 15, 1962.

FRANK H. SCHMID, *Clerk.*

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[17] In a comparable situation the Supreme Court adhered to the jurisdictional test of the Natural Gas Act [FPC v. East Ohio Gas Co., 338 U.S. 464 (1950)] and Congress then enacted a clear and limited exception in favor of "any person engaged in . . . the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State . . . provided that the rates . . . of such persons . . . be subject to regulation by State commission. . . . A certification from such State commission to the Federal Power Commission that such State Commission has regulatory jurisdiction over [such] rates . . . and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction."—15 U.S.C.A. § 717(c). See S. Rep. No. 817, 83d Cong., 2d Sess.

APPENDIX B

United States Court of Appeals for the Ninth Circuit

No. 17608

SOUTHERN CALIFORNIA EDISON COMPANY, PETITIONER,

vs.

FEDERAL POWER COMMISSION, RESPONDENT.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, PETITIONER,

vs.

FEDERAL POWER COMMISSION, RESPONDENT.

DECREE

Before: CHAMBERS, MERRILL and BROWNING, Circuit Judges.

THIS CAUSE came on to be heard upon the petitions of the Southern California Edison Company, filed November 6, 1961 and Public Utilities Commission of the State of California, filed November 7, 1961, to review and set aside orders of the Federal Power Commission of July 31, 1961 and September 14, 1961. The Court heard argument of respective counsel on June 15, 1962, and has considered the briefs and transcript of record filed in this cause. On November 15, 1962, the Court being fully advised in the premises, handed down its decision, in conformity thereto, it is hereby

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Ninth Circuit that the Order of the Federal Power Commission herein of July 31, 1961 be and hereby is set aside.

A true copy:

Attest: December 27, 1962:

Frank H. Schmid,
FRANK H. SCHMID,
Clerk.

(Endorsed)

Filed November 15, 1962.
FRANK H. SCHMID, *Clerk.*

APPENDIX C

1. The Federal Power Act, Federal Water Power Act of June 10, 1920, 41 Stat. 1063, 16 U.S.C. 791–825r, as amended, provides, in pertinent part, as follows:

> SECTION 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.
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> (b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or

over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part. [49 Stat. 847; 16 U.S.C. 824]

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SEC. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules show-

ing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into

effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [49 Stat. 851; 16 U.S.C. 824d]

SEC. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly

discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy. [49 Stat. 852; 16 U.S.C. 824e]

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2. The Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U.S.C. 717, *et seq.*, provides, in pertinent part, as follows:

SEC. 1

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(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. 717(b)]

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